CHIA YAN TEK & ANOR

v.

NG SWEE KIAT & ANOR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: B-02-821 OF 1995]
3 JULY 1997

CONTRACT: *Fraudulent misrepresentation - Whether renders a contract voidable - Whether contract void - Contracts Act 1950, s. 19(1)*

CIVIL PROCEDURE: *Appeal - Credibility of witnesses - Functions of appellate court - Whether appellate court should interfere*

CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction - Restitution - Variation or reversal of order of lower court - Jurisdiction of appellate court to grant restitution - Costs, interests, damages, compensation, mesne profits*

The appellants brought an action for a declaration that their transfer of 100 shares in Peringkat Juta (M) Sdn Bhd ('Peringkat Juta') to the respondents was null and void because it was obtained by fraudulent misrepresentation. The appellants claimed that they were the owners of a piece of land ('the land') as they were the controlling mind and will of Peringkat Juta which became the registered proprietor of the land. The appellants had obtained the land with the assistance of one Murugan. Murugan was given a 70% shareholding in Peringkat Juta to obtain the alienation of the land but was to give up his rights to the shares once Peringkat Juta was registered as the proprietor. After the land was alienated to Peringkat Juta, the shares and the secretarial documents were handed over by the appellants to the respondents so that they could find a purchaser for the land. It was intended that the shares in Peringkat Juta be sold and transferred to a third party who would by that acquisition come to own the land. As the respondents did not sell the property to a third party, the appellants commenced legal proceedings to recover the property. The appellants obtained the necessary orders *ex parte* against the respondents, and seized the books and documents of Peringkat Juta and transfered away all the shares in Peringat Juta. The trial judge found in favour of the respondents and restored the *status quo ante* of the respondents before the offending *ex parte* order was obtained by the appellants. The appellants appealed to the Court of Appeal.

Held:
Per Gopal Sri Ram JCA

[1] Fraudulent misrepresentation renders a contract voidable. However gross the fraud may be, it does not make the contract void. This is made clear by s. 19(1) of the Contracts Act 1950.

[2] The decision of the court depends upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the trial judge were to be believed. An appellate court, before which there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it. The appellate function is best formulated by Lord Shaw of Dunfermline in *Clarke v. Edinburgh Tramways Co*.

[3] The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this the court may make any order including an order for the refund of costs or the payment of interests, damages, compensation or *mesne* profits as may properly be consequential on such variation or reversal of order.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

KONTRAK: *Salah nyataan fraud - Kontrak boleh dibatalkan - Akta Kontrak 1950, s. 19(1)*

PROSEDUR SIVIL: *Rayuan - Keputusan hakim perbicaraan - Untuk memutuskan kebolehpercayaan saksi-saksi - Fungsi rayuan*

PORSEDUR SIVIL: *Bidangkuasa - Bidangkuasa sedia ada mahkamah - Restitusi*

Perayu telah memulakan tindakan terhadap responden-responden untuk mendapatkan satu pengisytiharan bahawa pemindahan 100 saham dalam Peringkat Juta (M) Sdn Bhd ('Peringkat Juta') kepada responden-responden adalah batal dan tak sah kerana ianya telah diperolehi melalui salah nyata fraud. Perayu-perayu menuntut bahawa mereka adalah tuanpunya sebidang tanah kerana mereka merupakan daya pemikiran yang menguasai dan pengertak Peringkat Juta yang menjadi tuanpunya berdaftar tanah tersebut. Perayu-perayu telah memperolehi tanah itu dengan bantuan seorang bernama Murugan.

Murugan telah diberikan 70% pemegangan saham Peringkat Juta bagi mendapatkan pemberimilikan tanah tersebut. Tetapi beliau seharusnya menyerahkan kembali haknya kepada saham-saham itu sebaik sahaja Peringkat Juta didaftarkan sebagai tuanpunya. Selepas tanah itu diberimilik kepada peringkat Juta, saham-saham dan dokumen-dokumen kesetiausahaan telah diserahkan oleh perayu-perayu kepada responden-responden agar mereka boleh berusaha mencari pembeli bagi tanah tersebut. Adalah diniatkan supaya saham-saham dalam Peringkat Juta dijual dan dipindahmilik kepada pihak ketiga, perayu telah memulakan prosiding undang-undang untuk mendapatkan hartanah itu balik. Perayu-perayu telah mendapatkan perintah-perintah yang diperlukan secara *ex parte* terhadap responden-responden, dan telah merampas buku-buku serta dokumen-dokumen Peringkat Juta dan memindahkan kesemua saham-saham dalam peringkat Juta. Responden-responden telah membela diri mereka sendiri dan hakim perbicaraan telah memutuskan memihak kepada responden-responden selepas mendengar penegasan fakta-fakta oleh kedua-dua pihak. Hakim perbicaraan telah menghidupkan semula *status quo ante* responden-responden sebelum perintah *ex parte* yang menyalahi itu dilaksanakan oleh perayu-perayu. Perayu-perayu kemudiannya telah merayu kapada Mahkamah Rayuan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Menurut s. 19(1) Akta Kontrak 1950, salah nyata fraud menjadikan sesuatu kontrak itu boleh dibatalkan.

[2] Keputusan mahkamah bergantung pada bahagian-bahagian yang mana dari testimoni bercanggahan saksi-saksi yang telah memberikan keterangan lisan dihadapan hakim perbicaraan boleh dipercayai. Sesebuah Mahkamah Rayuan di mana tidak terdapat transkrip yang penuh mengenai keterangan lisan itu tidak mempunyai kedudukan yang bermanfaat untuk memutuskan sesuatu isu mengenai kebolehpercayaan daripada hakim perbicaraan yang telah mendengar keterangan itu sepenuhnya dan memerhatikan saksi-saksi ketika mereka memberi keterangan itu. Fungsi rayuan dirumuskan oleh Lord Shaw of Dunfermline dalam *Clarke v. Edinburgh Tramways Co* [1919] SC (HL) 35.

[3] Bidangkuasa untuk membuat restitusi adalah sedia ada dalam setiap mahkamah dan dilaksanakannya apabila keadilan sesuatu kes menuntutnya. Prinsip disebaliknya ialah bahawa apabila penghakiman utama atau perintah diubah atau diakas, kesemua pintah yang bersampingan atau bergantung padanya adalah terjejas dan kesalahan-kesalahan yang dibuat di bawahnya haruslah diperbetulkan dengan memberikan restitusi. Agar perkara ini dapat dilakukan, mahkamah boleh membuat sebarang perintah

termasuk perintah bagi pengembalian kos atau pembayaran faedah, gantirugi, pampasan atau hasil perantaraan sepertimana yang boleh secara wajarnya menjadi sampingan ke atas perubahan sedemikian atau pengakasan perintah.

[Rayuan ditolak dengan kos.]

Cases referred to:
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49 ***(foll)***
Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(foll)***
Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v. Tan Mei Hua & Ors [1971] 1 MLJ 107 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 19(1)

[Appeal from High Court Malaya, Shah Alam; Civil Suit No: 22-339-93]

For the appellants - Raja Aziz Addruse (CK Tan with him); M/s CK Tan & Co
For the respondents - Ajit Singh Muker; M/s Lovelace & Hastings

JUDGMENT

Gopal Sri Ram JCA:

The appellants in this case are husband and wife. They brought an action against the respondents who are also husband and wife. The relief claimed, in essence, was for a declaration that the transfer of 100 shares by the appellants to the respondents in a company known as Peringkat Juta (M) Sdn Bhd ('Peringkat Juta') is null and void and of no effect because it had been obtained by means of fraudulent misrepresentation.

Now, we must confess that when we first read the record we found that a little odd. Fraudulent misrepresentation renders a contract voidable. However gross the fraud may be, it does not make a contract void. This is made clear by s. 19(1) of the Contracts Act 1950.

To return to the facts, the gist of the appellants' case is that they are the true owners of a piece of land the alienation of which they had obtained by their own exertions. Their ownership was asserted by reference to they being the controlling mind and will of Peringkat Juta which eventually became the registered proprietor of the land. According to the appellants, it was the first appellant who applied for the land in June 1991. However, he did not have with him, and could not produce at the trial, a copy of the application made to the appropriate authority.

It was further contended by the appellants that they had obtained this land through the assistance of one Murugan, the political secretary to a State Assemblyman, one Dato' Thurai, who has since died. Murugan was given a 70% interest in the shareholding of Peringkat Juta in order to obtain the alienation of the land in question. But he was to give up his rights to the shares once Peringkat Juta was registered as the proprietor. So what in effect the appellants were disclosing to the court was a scheme to pervert the system of public administration of a State by misrepresenting the true facts in order to obtain the alienation of land unto themselves. This aspect of the case was never pursued in the court below. We therefore do not propose to say anything further about it.

After having got the land alienated to Peringkat Juta, the shares in it as well as the other secretarial documents were handed over by the appellants to the respondents. The appellants said that they did this only because, on the faith of an assurance given by the late Dato' Thurai, they trusted him and the respondents to find a purchaser for the land. It was not proposed to sell the land itself. What was intended was that the shares in Peringkat Juta would be sold and transferred to a third party who would by that acquisition come to own the land.

The first appellant in evidence before the trial judge testified that he had on several occasions approached the respondents on the question of the sale to a third party. Nothing happened. He was concerned and became apprehensive. He wanted to get the property back. So he commenced legal proceedings to this end.

What happened soon after filing of the writ is a matter of astonishment. The appellants proceeded *ex parte* before a judge in the High court at Shah Alam. They placed a summons before him asking for an injunction. They also had a prayer for a declaration in terms corresponding to the relief claimed in prayer l of the statement of claim. They obtained both orders.

We find this quite amazing because a declaration may not be obtained in this fashion, without argument and *ex parte*. Armed with the Order, they seised the books and documents of Peringkat Juta in the hands of the respondents. With almost equal speed, they proceeded to transfer all the shares in Peringkat Juta to two companies and an individual. Valuable consideration exchanged hands and the transaction was completed. The respondents were thus left to fight a rear-guard action to defend what they had had in their hands until the execution of the *ex parte* Order we spoke of a moment ago.

Both sides called a number of witnesses in support of their respective cases. The appellants' claim turned on an assertion of facts made by them. Much the same was the respondents' case.

In order to persuade the trial judge that their respective versions were the truth, Raja Aziz Addruse, counsel for the appellants before us (but who did not appear in the court below) identified three points of reference. He has neatly summarised them as follows:

(1) When was the application for alienation of the land made?

(2) Who made the appeal to reduce the premium levied by the State Authority for the alienation of the land?

(3) Who purchased the shelf company?

After an admirable analysis of the evidence, the learned trial judge, James Foong J, found the respondents' version of events to be more consistent with truth than the version advanced by the appellants. He dismissed the appellant's claim with costs and made some consequential orders, to which we will refer later in this judgement. The appellants, being dissatisfied with the decision of the trial judge, have appealed to this court.

Raja Aziz Addruse, with his usual clarity, has highlighted several points, which he says were overlooked by the trial judge. For example, counsel has drawn our attention to the letter of approval by the land office at Petaling, which speaks of an application for alienation made on 28 June 1991. Raja Aziz says this is entirely consistent with the first appellant's version because the first appellant said that he had made the application in June 1991.

Counsel then referred us to an application claimed by the respondents to be theirs. It appears on p. 1032 of Vol. 3 of the Record of Appeal.

The date of that document is 1 November 1991. That date is inconsistent with the date appearing on the letter of approval. It follows, counsel submits, that what had been approved was his clients' application and not the application produced by the respondents. As we have said, the first appellant could not produce a copy of the application that he had submitted.

But we would hasten to add that there is other evidence, which does not appear to support the appellants' argument. The Assistant Land Administrator, Petaling, who was called as a witness by the respondents, testified that apart from the application dated 1 November 1991 (which he produced from his file to the court) no other application had ever been made in the name of Peringkat Juta. There had, however, been an application by some other company for the same piece of land.

Based on the evidence presented before him, the trial judge was entitled to make his own assessment as to where the truth lay. Though, at first blush, we found the argument of Raja Aziz on the several points of reference to be attractive in point of logic, we must respectfully say that upon closer examination they are without merit.

In the words of Lord Diplock in *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49, 50:

> [T]his was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge, at trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

The approach an appellate court should adopt in a case of this nature has been stated repeatedly. But we must express our own inability to find a clearer statement of the appellate function than that formulated by Lord Shaw of Dunfermline in his speech in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 at p. 36. This is how he put it:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question, Am I – who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Having read the judgment appealed against and having given the utmost consideration to the submissions of counsel for the appellants, we are unable to say that this case is one which warrants appellate intervention. On the other hand, we are entirely satisfied that the learned judge adopted the correct approach and judicially appreciated the evidence presented to him without falling into error and without misdirecting himself.

We now turn to consider the orders made by the learned judge. When we first countenanced them we thought they had been made without jurisdiction because what the learned judge had done, or attempted to do, was to restore the *status quo ante*, before the offending *ex parte* order had been obtained by the appellants. We formed the initial opinion that such orders could only be made in the face of a counterclaim which was absent in the present case.

However, in response to questions from us, Mr. Muker has drawn our attention to the following passage in the judgment of Sharma J in *Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v. Tan Mei Hua & Ors* [1971] 1 MLJ 107, 109:

> The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. (See *Jai Berhm v. Kedar Nath Marwari* AIR [1922] PC 269, *Prayag Narain v. Kamekhea* LR 36 IA 97). In *Lala Bhagwan Das v. Lala Kishen Das* [1953] SCR, the Supreme Court of India put the matter thus:
>
> > On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that is the duty of the court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.
>
> The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this the court may make any order including an order for the refund of costs or the payment of interests, damages, compensation or *mesne* profits as may properly be consequential on such variation or reversal of order.

Having read what Sharma J had to say upon that occasion, we are satisfied that the learned judge was entirely correct in making the orders that he did and had ample jurisdiction to grant them. Raja Aziz, with usual candour, supports the view expressed in the passage quoted above.

For the reasons given thus far, we are of the opinion that this appeal lacks merit and should be dismissed. We would accordingly do so and make those orders which are consequent upon dismissal.

Our orders are as follows.

The appeal be and is hereby dismissed with costs. The orders of the judge are affirmed. With the consent of counsel on both sides, we award RM10,000 as costs of the appeal in lieu of taxation. The deposit lodged in court shall be paid out to the respondents to account of their fixed costs.

Reported by Bernadette Soosai